Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1998

JOANN CARPENTER,

Petitioner,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR *WRIT* OF *CERTIORARI*

Nicholas H. Hantzes
12110 Sunset Hills Road
Suite 450
Reston, Virginia 20190
(703) 378-5000

Dennis M. Hart
1301 Pennsylvania Ave., N.W.
Suite 500
Washington, D.C. 20004

Counsel for the Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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QUESTIONS PRESENTED FOR REVIEW

1. The panel opinion of the court of appeals is in conflict with the holdings of *Adickes v. S.H. Kress*, 398 U.S. 144 (1970) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) in that it subverts the meaning of reasonable inference in the context of summary judgment and is contrary to the Court's intentions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) in that it permits a court to fashion any set of assertions into an inference of non-discrimination even if that inference is neither reasonable nor supported by the facts.

2. The court of appeals opinion is in conflict with public policy concerning the protection against gender discrimination in the workplace when it concludes without any legal authority that, as a matter of law, the advocacy of anti-fraternization policies in the workplace and gender discrimination are not related. The opinion sets a dangerous precedent when it affirms the dismissal of a case of alleged gender discrimination against an advocate of anti-fraternization on the basis that male management's adverse action is not connected with discrimination.

PARTIES INVOLVED

The following individual appeared as a plaintiff in the United States District Court for the District of Columbia and as an appellant in the United States Court of Appeals for the District of Columbia Circuit: JoAnn Carpenter. The Federal National Mortgage Association appeared as a defendant in the District Court and as an appellee in the Court of Appeals.

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PETITION FOR *WRIT* OF *CERTIORARI*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 22, 1999, affirming the decision of the United States District Court to dismiss her claim of workplace gender discrimination.

Opinion Below

A panel of the United States Court of Appeals for the District of Columbia Circuit issued an opinion on January 22, 1999, which affirmed the District Court's summary dismissal of her action for workplace discrimination. *Carpenter v. Fannie Mae*, 165 F.3d 69 (D.C.Cir.1999). A copy of the opinion is reproduced at Appendix A. Petitions for rehearing and for rehearing *en banc* were timely filed and denied by order dated March 5, 1999. The orders of denial of these petitions are reproduced in Appendix B.

Jurisdiction

The United States Court of Appeals for the District of Columbia entered its final judgment on appeal on January 22, 1999, and denied Petitioner's Petition for Rehearing on

March 5, 1999. This Court has jurisdiction of this direct appeal pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

The Fourteenth Amendment to the Constitution provides, in pertinent part that "No person . . . shall be deprived of life, liberty or property without due process of law . . . ."

Statutes Involved

Petitioner filed suit in the United States District Court for the District of Columbia pursuant to the District of Columbia Human Rights Act, D.C.Code §1-2512 on behalf of herself alleging workplace discrimination. A copy of that statute is reproduced in Appendix C.

Statement of Facts

Petitioner seeks review of the January 22, 1999, judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed the district court grant of summary judgment on her claim of employment discrimination on the basis of gender.

Petitioner JoAnn Carpenter has served as a vice president and deputy general counsel at the Federal National Mortgage Association (Fannie Mae) legal department since 1987. In July of 1996, Fannie Mae promoted one of its

vice presidents to a new supervisory and management role, equivalent to senior vice president. Fannie Mae proffered that Senior Vice President Anastasia Kelly, who had joined Fannie Mae before this action as an outside hire, selected Joseph Biegel instead of Carpenter for this role.

In a motion for summary judgment, Fannie Mae claimed that Biegel was selected by Kelly after she considered all the other vice presidents in the Office of General Counsel due to his superior qualifications. Petitioner argued to the district court that there were numerous items of evidence that demonstrated that discrimination was the reason for the decision. She presented evidence that Fannie Mae's explanation was false plus other evidence of discrimination. Before Petitioner filed her lawsuit, she brought her claim to Kelly's attention. Kelly admitted that Carpenter had a meritorious claim for discrimination. Moreover, Kelly asked Petitioner how Fannie Mae could mitigate the damage and offered to give her valuable stock options. Furthermore, Carpenter supplied facts which demonstrated that she actively favored the implementation of an anti-fraternization policy that was anathema to high level male management and that because of her promotion of this policy, upper male management at

Fannie Mae formed a gender bias against her which resulted in her being denied real consideration as a candidate for promotion. There was also evidence that during the period in which upper male management refused to implement an anti-fraternization policy, the male who then occupied the position of Vice President for Human Resources–the person responsible for ensuring compliance with the sexual harassment laws–engaged in one incident of sexual harassment of a lower level female employee, and another instance of retaliating against a female employee who testified to the harassment. Carpenter demonstrated that upper male management realized that they had potential exposure and attempted to cover this discriminatory effort by generating false and misleading evaluations of Carpenter which were concealed from her and used Kelly as a pawn for upper male management's decision. The record showed that the alleged inferior aspects of Petitioner's performance were concealed from her for a two-year period and were not disclosed until they were provided during discovery in this case.

Carpenter also presented evidence from which a reasonable jury could find that Fannie Mae's explanation for its selection of the male candidate was false. Fannie Mae

claimed that in the Spring of 1996, Kelly made the selection by considering all the vice presidents in the Office of General Counsel and decided that the male selected was the most qualified to assist with management responsibilities. On the other hand, Petitioner presented evidence to demonstrate that this explanation was false, including that (1) Kelly was not the true decision-maker, (2) she did not consider all the candidates, (3) upper male management preselected the male candidate four months before Kelly allegedly made the decision, and (4) Carpenter had superior qualifications to the male selected. The falsity itself in this case points in the direction of discrimination, because upper male management was seeking to conceal the actual decision-makers by substituting a female decision-maker.

The district court dismissed the complaint. On appeal, the panel opinion of the court of appeals concluded that the Petitioner was not the subject of discrimination because the court, focusing only on a single piece of evidence, concluded that Petitioner's advocacy of an anti-fraternization policy was not related to gender discrimination.

In so concluding, the opinion fashioned a rule which permits a reviewing court to discount all evidence of

discriminatory actions when a single item introduced for the purpose of proving falsity can be interpreted as non-discriminatory. Even if such a questionable rule were appropriate, the opinion below was incorrect in its essential holding that the inference upon which the court seized to the exclusion of all others was non-discriminatory.

A petition for rehearing was timely filed and denied on March 5, 1999. A request for *en banc* review was also denied on March 5, 1999. (Appendix B).

I. THE OPINION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT THAT SERVE AS THE FOUNDATION FOR EMPLOYMENT DISCRIMINATION LITIGATION ON THE ISSUE OF SUMMARY JUDGMENT AND THE REASONABLE INFERENCES THAT CONTROL SUCH ACTION

Petitioner submits that the opinion below ignores the requirements of this Court's long line of decisions for the requirements of a motion for summary judgment as announced as early as *Sartor v. Arkansas Natural Gas*, 321 U.S. 620 (1944), refined in *Adickes v. S.H. Kress*, 398 U.S. 144 (1970) and controlled by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477

U.S. 317 (1986) and *Matsushita Electric Industrial Co., v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Petitioner believes that the effect of the panel decision in this case undermines the ruling in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The panel decision improperly encroached on the role of the jury by limiting the reasonable inferences available to a plaintiff to prove discrimination and improperly weighing the evidence and giving conclusive weight to one piece of evidence to the exclusion of all other evidence.

1. PETITIONER BELIEVES THAT REVIEW IS REQUIRED TO CLARIFY THE LIMITS ON A COURT'S DISCRETION IN DETERMINING WHETHER THE INFERENCE OF DISCRIMINATION IS REASONABLE BASED ON THE EVIDENCE

The panel, in exercising its power to determine whether a reasonable inference of discrimination could be drawn from the evidence, ruled, as a matter of law, there is no relationship between advocacy in favor of anti-fraternization and protection against gender discrimination.

There was no legitimate basis for the panel to convert Petitioner's advocacy for an anti-fraternization policy in the face of resistance from upper male management into evidence of a non-discriminatory reason for the employer's decision. To the contrary, as demonstrated below, corporate America and case law have established anti-fraternization policies as an essential component of a policy to prevent sexual harassment. Accordingly, the evidence that Petitioner, a female, advocated with zeal for the adoption of anti-fraternization policies in a male dominated environment and was treated adversely is evidence a reasonable jury could find supports a finding of gender discrimination. The panel decision, if left undisturbed, will permit courts to limit, on an arbitrary basis, the range of permissible inferences available to an employee in a discrimination case. This approach is contrary to the decisions of this Court.

The current leading case in this Court regarding motions for summary judgment is *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). It is based on a line of reasoning that begins with *Sartor v. Arkansas Gas*, 321 U.S. 620 (1944) and includes the seminal decision in *Adickes v. S. H. Kress*, 398 U.S. 144 (1970).

The *Anderson* decision requires that the focus of the determination in a motion for summary judgment is whether a reasonable jury could return a verdict for the non-moving party. Equally clear from *Anderson* and *Celotex* is that while a court has substantial power to examine the evidence in light of the elements of the cause of action, a court considering a motion for summary judgment cannot weigh the evidence, must resolve all disputes in favor of the non-movant and resolve all inferences in favor of the non-movant. *Anderson*, 477 U.S. at 255. This is required because *Adickes* recognized the danger when a judge is permitted to weigh the inferences and reach conclusions based on probability, rather than a standard which requires a complaint to prevail if it can demonstrate that there is some theory of liability and that not all possibilities of recovery are foreclosed by assertions of the moving party. *Adickes*, 358 U.S. at 157-58.

The panel clearly violated the prohibition against weighing the evidence and reading all inferences in favor of the non-movant. The Court's decisions to date do not give a court the power to bar a fact finder from making a permissible inference simply because it suspects the inference is less readily made than others. Rather, "the

drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255.

The panel's decision undermines these standards by improperly limiting the range of permissible inferences which a reasonable jury could infer from the evidence. While this Court's decision in *Zenith Radio* established that the range of permissible inferences can be limited by substantive law, there was no such substantive law that permitted the panel in this case to limit the inference which a reasonable jury could find from Carpenter's advocacy in favor of anti-fraternization or any other evidence in the case. The panel did not cite any case law, statutory law or expert opinion evidence in the record to support its conclusion that a jury could not infer that Carpenter's stance on anti-fraternization in the face of resistence from upper male management supports a motive to discriminate against her on the basis of gender.

Anderson does not permit a judge or appellate panel to substitute its belief of reasonableness for that of a jury. By the same token, a trial judge or reviewing court cannot be permitted to make a finding regarding the reasonableness of any inference which requires the court to

base that finding on specialized knowledge of a field for which there is no evidence in the record. To do so, permits a court to arbitrarily supplement the record.

The panel in this case erroneously concluded that there is no relationship between anti-fraternization and gender discrimination by going beyond its role of determining whether a juror could reasonably infer upper male management's resistance to Petitioner's advocacy of anti-fraternization was evidence, when considered along with the other evidence in the record, which supported her claim for gender discrimination. Furthermore, the panel relied on non-expert opinion from persons not even in the employment relations field, which was not in the record, to support its conclusion that the inference was unreasonable. The fact that the panel found it necessary to refer to non-expert sources outside the record demonstrates that it went beyond the role of determining what a reasonable juror would find based on common experience in determining what a reasonable inference was from the evidence. Had the panel not ventured beyond its appropriate role, it would not have come to the erroneous, unsupported conclusion that there is no relationship between anti-fraternization and sexual harassment.

This back door approach to limit Petitioner's right to jury trial must be rejected by this Court for it inserts a nearly unlimited variable into the evidence equation. If trial courts summarily dismiss discrimination cases because they can derive some irregular twist on a theory of liability that may not fall strictly within the channel of direct evidence of discrimination, then trial courts act outside the traditional summary judgment role. Furthermore, such a rule is a potential disaster to employment discrimination plaintiffs, since as courts have regularly recognized, the direct evidence of discrimination is often impossible to obtain. By expanding the power of a court in ruling on a motion for summary judgment to substitute its own belief (rather than that of a reasonable juror) concerning what legitimate inference may be drawn from the evidence, the panel opinion destroys any guidance which the Court hopes to impart with *McDonnell Douglas* and its progeny and *Anderson*. Equally troubling is the panel's willingness to make its conclusion regarding reasonable inferences in areas involving specialized knowledge by relying on non-expert sources which were not in evidence.

2. PETITIONER BELIEVES THAT REVIEW IS REQUIRED TO RESOLVE THE CONFLICT BETWEEN THE PANEL DECISION AND THIS COURT'S DECISION IN *ANDERSON v. LIBERTY LOBBY*

If the panel's decision is permitted to stand, the standards for summary judgment in an employment discrimination case will be different form other cases. Petitioner in this case demonstrated, in accordance with *St. Mary's*, evidence from which a reasonable jury could find that the employer's explanation was false plus other evidence of discrimination. However, the panel granted summary judgment by providing conclusive weight to one single piece of evidence, which it erroneously construed against the non-movant Petitioner. The exclusion of all other evidence that supported the Petitioner's claim directly confronts this Court's rules on summary judgment.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Court ruled that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." In discussing the question of what evidence was sufficient to create a jury question, the

court recognized that the question was not simply whether there was evidence from which a reasonable jury might draw an inference of a material fact. Rather the question was whether the moving party had "foreclosed the possibility of the existence of certain facts from which 'it would be open to a jury . . . to infer from the circumstances' the material fact." *Anderson*, 477 U.S. at 248-49.

The panel decision in this case conflicts with *Anderson* because the court of appeals granted summary judgment despite the fact that movant Fannie Mae's argument did not foreclose the possibility of the existence of facts from which a jury could infer discrimination from the circumstances.

The District of Columbia Circuit's decision, if permitted to stand, will permit a court to grant summary judgment whenever it believes there is a single disputed fact in the record that will support a finding of non-discrimination. Contrary to the teaching in *Anderson*, the panel decision did not require the movant to foreclose the possibility of a jury inferring discrimination from all the circumstances demonstrated by Petitioner's evidence. Instead the panel granted summary judgment by focusing

exclusively on one fact that it believed supported a finding of no discrimination.

Even if Petitioner's advocacy in favor of an anti-fraternization policy does not support a finding of gender discrimination, the remaining facts in the record were sufficient for a jury to infer discrimination from the circumstances. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972), the Court identified the elements of proof that establish a *prima facie* case in a disparate treatment discrimination case. The Court articulated the elements as follows: (1) plaintiff is a member of a protected class, (2) plaintiff applied for a job for which the employer was seeking applicants, (3) plaintiff was rejected for the job despite his or her qualifications for the position, and 4) following the rejection, the position remained open and the employer continued to seek applications from persons with comparable qualifications. 411 U.S.at 802 (1973). As the Court further noted, however, this standard is not absolute and the Court recognized that those particular elements would not apply in every case given the inevitably different facts that comprise each case. *Id.* at 802 n. 13. Courts have recognized that the fourth element requires only a showing that plaintiff was rejected for the position under

circumstances giving rise to an inference of unlawful discrimination. *See Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994). Without question, Petitioner fulfilled the first three elements.

Petitioner also fulfilled this fourth element by the minimal showing that the position in question was filled by a male. However, Petitioner went much further, and identified numerous other pieces of evidence from which a jury could find that she was rejected under circumstances giving rise to an inference of discrimination. Petitioner presented substantial evidence of circumstances from which a jury could infer discrimination even if the jury ignored the evidence relating to anti-fraternization. A finding that anti-fraternization is unrelated to sexual harassment does not change the following circumstances from which a jury could infer discrimination: (1) Kelly admitted Petitioner's claim had merit, (2) Kelly offered to mitigate the damage, (3) Petitioner had substantially more seniority than the selected male, (4) the alleged inferior skills of Petitioner were never disclosed to her prior to the selection, (5) the selection process was concealed, (6) the selected male was the only candidate considered and (7) Fannie Mae sought to substitute a female for the actual male decision-makers. In

addition, the Respondent's motion for summary judgment did not preclude the possibility that a jury could find on the record presented below that Petitioner was better qualified than the selected male. These facts when taken together would support a finding of gender discrimination and placed in dispute the employer's explanation in a manner that pointed in the direction of discrimination. Thus, even if *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) is interpreted to require proof that the employer's proffered explanation is false plus other evidence of discrimination, this Petitioner was entitled to go to trial.

II. THE OPINION OF THE COURT OF APPEALS THAT THE PETITIONER'S ADVOCACY OF ANTI-FRATERNIZATION HAS NO RELATION TO THE SUBSEQUENT GENDER DISCRIMINATION IS WITHOUT LOGICAL OR LEGAL BASIS AND IS CONTRARY TO COMMON EXPERIENCE.

The lynchpin of the court of appeals decision is that there is no relationship between the Petitioner's advocacy of an anti-fraternization policy in her workplace and the subsequent employment discrimination she suffered. Petitioner submits that this conclusion is not just wrong, but

dangerously wrong and must be addressed by action of this Court.

A. The Panel Opinion Is Incorrect in its Central Conclusion that Advocacy of Anti-Fraternization Is Not Related to Sexual Harassment in the Workplace

The panel opinion in this case revolves around the essential conclusion that the advocacy of an anti-fraternization policy in the workplace is not related to sexual harassment and therefore should not be protected from employer discrimination. This central conclusion is incorrect and Petitioner suggests that this mistake of the panel opinion is serious and represents a danger to accepted employment protection values.

1. The Reality of the Corporate Experience

Based on little authority but "everyday life," the panel opinion wrongly concludes that there is no link between the advocacy of anti-fraternization and protection against sexual harassment. (Panel Opinion at App-1, 165 F.3d at 73) Nothing could be further from reality. Corporate America, from Wal-Mart and Burger King to

IBM,[1] has long concluded that a fraternization policy that regulates the conduct between employees---particularly as in this case between management and lower level employees---is an essential part of a corporate policy to prevent sexual harassment. This conclusion has been accepted by the courts that have considered the matter directly and the principle has been recognized as a legitimate business concern: "Fraternization which includes a supervisory or management employee may be perceived as favoritism or sexual harassment." *Watkins v. United Parcel Service*, 797 F.Supp. 1349, 1351 (S.D.Miss 1992) *aff'd*, 979 F.2d 1535 (5th Cir. 1992)[2]. Moreover, the connection between anti-fraternization and an anti-harassment policy has been accepted as a valid one for some time by both corporations and by courts. *Parks v. City of Warner Robbins*, 43 F.3d 609, 615 (11th Cir. 1995)[fraternization

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[1] *Smith v. Wal-Mart Stores*, 891 F.2d 1177 (5th Cir. 1990); *Providence Journal Bulletin*, February 8, 1998, Business Section, p. 1E; *Rogers v. International Business Machines Corp.*, 500 F.Supp. 867 (W.D.Pa. 1980).

[2] A written version of the UPS policy reflects the corporate concern over sexual harassment directly: "Fraternization is discouraged throughout our organization. Fraternization which includes supervisory or management employee[s] may be perceived as favoritism or sexual harassment. Fraternization between a supervisor or manager and an employee is not permissible." *Ohio Employment Law Letter*, Vol. 8, No. 5, May 1997, "To Prevent Lawsuits, Company Tells Managers Not To Fraternize–Nice Try."

policy of city reasonably related to "...decreasing likelihood of sexual harassment in the workplace."]; *Coatney v. Enterprise Rent-A-Car*, 897 F.Supp. 1205 (W.D.Ark. 1995); *Crosier v. United Parcel Service*, 150 Cal. App.3d 1132 (Ca. Ct. App. 2nd Dist. 1983); *Harrison v. Jack Eckerd Corp.*, 342 F.Supp. 348 (M.D. Fla. 1972), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

Thus, it should come as no surprise that corporations, government and other organizations regularly incorporate anti-fraternization policies as one of their primary tools against sexual harassment and other organizational problems.[3] By claiming, as the panel opinion explicitly does in its rationale, that consensual relationships have nothing to do with harassment claims, the opinion collides with reality:

> While a consensual sexual relationship cannot form the basis of a viable sexual harassment suit under Title VII of the Civil

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[3] *Lathem v. Department of Children and Youth Services*, 172 F.3d 786 (11th Cir. 1999)[fraternization policy accepted standard for local government in welfare client contact]; *Hafford v. Seidner*, 167 F.3d 1074 (6th Cir. 1999)[fraternization policy legitimate in penal setting]; *Shumway v. United Parcel*, 118 F.3d 60 (2nd Cir. 1997)[fraternization policy legitimate corporate concern]; *U.S.I.A. v. Krc*, 989 F.2d 1211 (D.C.Cir. 1993)[fraternization legitimate federal government security policy].

> Rights Act of 1964 . . . such a relationship can evolve into sexual harassment when one participant wishes to continue it and the other does not. The continued relationship and attendant advances, remarks or other conduct then could become unwelcome to the unwilling party. Employers thus should not ignore employees[']claims of sexual harassment because they believe the relationship has been consensual. The employer still must ascertain whether the relationship was and remains consensual for both parties. Herbst, *The National Law Journal*, February 26, 1996, p. 19.

As a result, it is widely acknowledged that such policies are clearly one of the most effective corporate defenses to charges of both individual sexual harassment and hostile workplace claims. *See, for example, Los Angeles Times*, Commentary Business Section, p. 5, April 27, 1997 ["Thus, a policy that prohibits fraternization between management and nonmanagement employees is not only legal but wise. It can help prevent sexual harassment claims, conflicts of interest, and perceptions of favoritism

that might arise from dating or other relationships between managers and nonmanagement employees."]; *The Business Journal*, No. 35, Vol. 15, December 22, 1997, p. 25 ["Unfortunately, many companies don't develop policies until a problem occurs, which sometimes means legal action is being taken, experts said . . . . Although some companies only require supervisors to disclose a personal relationship with a subordinate, Intel Corp.'s policy strictly prohibits such relationships."]; Herbst, *The National Law Journal, supra* ["An employer that fails to institute adequate policies or to monitor employee relationships appropriately not only may be subject to lawsuits, but also may be setting the stage for complicated management problems. Employers, however, can take appropriate measures [*i.e.*, non-fraternization policies] that address legitimate business interests without unduly infringing upon employee rights of privacy and non-discrimination."][4]

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[4] An excerpt from the Burger King anti-fraternization policy is typical: "Fraternization does not foster such an environment inasmuch as it tends to adversely affect work relationships. Moreover, of a more serious nature, it enhances the possibility of:(1) SEXUAL HARASSMENT charges with its potential financial liability to the guilty party and the company and adverse affect it may have upon the individual's career development. (2) DISCRIMINATION CHARGES by co-workers who may perceive preferential treatment resulting from such relationships.

The connection between advocating anti-fraternization and the protection against gender discrimination cannot be any clearer. The position of the employer in this case against anti-fraternization is relevant to individual discrimination against this Petitioner and can easily serve in this example as a proxy for gender bias. The conclusion of the panel opinion to the contrary is simply wrong.

2. The Sources Relied Upon by the Panel Are Not Authoritative and Contradict the Conclusion of the Opinion

The conclusion that there is no connection between sexual harassment and anti-fraternization policies in the workplace is advanced by the panel with the support of two authorities. 165 F.3d at 73. Petitioner urges the entire Court to examine these sources before the imprimatur of a court decision is imparted to the principles announced.

The court of appeals relies entirely upon two newspaper articles that were clearly published in the context of then-current allegations of White House misconduct.

It is primarily to avoid the potential problem areas indicated above that this policy is necessary." *Mughal v. Chart House*, __ F.Supp.__, 1986 WL 9539 (N.D.Ill, 1986).

Both are clearly partisan defenses to those allegations. Yet, even disregarding their adversarial nature, they do not, in fact, support the conclusion of disconnect that the panel relies upon. *The Fort Worth Star-Telegram* opinion piece by Gloria Steinem (March 29, 1998) defends the actions of President Clinton by arguing that sexual harassment in the workplace takes place when the relationship is unwelcome--a point with which Petitioner agrees. However, the article does not really address anti-fraternization policies. The second article upon which the panel opinion relies, *Chicago Tribune*, February 6, 1998, begins with the same theme regarding consensual relationships but in the fourth paragraph recognizes the clear connection between sexual harassment in the workplace and a policy of anti-fraternization:

> Indeed, many organizations and institutions either bar fraternization of this nature or provide that if such a relationship sours and there is an allegation of harassment and retaliation by the junior party, there will be a presumption against the senior.

Thus, contrary to the panel opinion conclusion, this author (whose article appeared in the *Tribune's*

Commentary section) recognizes that anti-fraternization is inextricably linked, at least in the minds of "many organizations and institutions," with sexual harassment policies. This observation is not surprising in light of the role such policies have in the past and continue to play in employment litigation and employers' attempts to prevent that litigation.

It should be clear that the conclusion of disconnect proposed by the panel opinion is supported by neither common sense, nor everyday business practice and certainly not by the authority which the panel suggests.

B. The Panel Opinion Sets a Dangerous Precedent for Both Anti-Fraternization Policies and Workplace Advocates Opposed to Sexual Harassment

The panel opinion drives a stake through the notion that policies regarding fraternization are enacted to foster a fair workplace. It should be obvious that as the enforcement of gender discrimination laws becomes more commonplace, overt egregious discriminatory acts will shift to more nuanced and subtle forms of discrimination that are no less objectionable or illegal. Anti-fraternization policies are essential to prevent these types of actions from

generating lawsuits. This has increasingly been recognized as a problem in corporate America. *The Washington Post*, "Executives' Privilege," September 16, 1998, page 1 [". . . but management experts are increasingly critical of liaisons involving top executives and subordinates, saying that they hurt morale and can end sourly amid charges of sexual harassment or perceived favoritism."]

Nor should it be thought of as an exclusively corporate concern. Both the military services and educational institutions have had recent public reviews of fraternization policies (or the lack of them) in relationship to allegations of sexual harassment.[5]

By creating a disconnect between advocacy of anti-fraternization and gender discrimination,the panel opinion in this case introduces several radically dangerous problems. In the first instance, it strips any protection an advocate against gender discrimination may have unless compelling

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[5] CBS Evening News, April 7, 1998 [Army to consider revisions in policy on fraternization following court martial acquittal of Sergeant Major Gene McKinney]; Associated Press, February 25, 1997, "School Spells Out Policies On Sexual Harassment, Hazing, Fraternization" [school plan submitted to U.S. District Court in Roanoke includes non-fraternization as part of policy to protect female freshman from sexual harassment at Virginia Military Institute following Supreme Court order to admit women]. *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407 (W.D.Va. 1991)[same].

evidence can be produced to demonstrate direct discrimination against the advocate. Such a proposal flies in the face of public policy which, in the past, has protected advocates in such matters as racial equality, for example.

Secondly, it serves to eliminate the protection which anti-fraternization has provided in the past to corporate defendants who have relied upon it in countless cases in the past to defend themselves in sexual harassment cases.

> Perhaps the greatest risk to any employer of unrestricted co-worker dating is a sexual harassment claim. What at first may seem an innocent office romance may eventually invoke a claim of sexual harassment when the romance comes to an unpleasant end. Behavior that may have been acceptable during the context of a consensual relationship may become harassing when the conduct becomes unwelcome by one of the parties. Additionally, a third party "reverse sexual harassment" claim may also be initiated by an employee who asserts that he or she was passed over for advancement or raises in favor of a co-worker who is having

> a romantic affair with a supervisor. What can an employer do to prevent such a problem?
>
> *North Dakota Employment Law Letter*, Vol. 2, Issue 7, August, 1997, "Corporate Affairs: Libido in the Workplace."

The answer to that question by commentators in the past has been the enactment and enforcement of non-fraternization policies, not only to prevent lawsuits, but to provide employers with a defense to sexual discrimination litigation. The panel opinion strips that policy of its defensive character since it explicitly says--for the first time anywhere--that there is no connection between fraternization policies and sexual harassment. Thus, the essential conclusion of the panel opinion is not just wrong, but dangerous as well.

This camouflaged approach to limit a plaintiff's right to jury trial by introducing an incremental creep to the permissible envelope of non-discrimination action inferences must be rejected by this Court. Trial courts act outside the traditional summary judgment role which this Court required in *Adickes* and *Anderson* if they are allowed to dismiss discrimination cases by substituting their own beliefs

rather than those of a reasonable juror concerning what reasonable inference may be drawn. This is contrary to the principles established in *McDonnell Douglas* and *St. Mary's* and their progeny. In addition, courts should not determine reasonable inferences in areas involving specialized knowledge by relying on non-expert sources which were not in evidence. Moreover, the danger of such an effort is demonstrated in the panel decision in this case which reaches conclusions on the role of advocacy of anti-fraternization which are contrary to both logic and analysis by prior courts.

CONCLUSION

Wherefore, Petitioner respectfully requests this Court grant the writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JoAnn Carpenter

By: Nicholas H. Hantes
Counsel for Petitioner
12110 Sunset Hills Road
Suite 450
Reston, Virginia 20190
(703) 378-5000

Dennis M. Hart
Counsel for Petitioner
1301 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20004
(202) 347-1820

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7201

JOANN CARPENTER,

Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellee.

Appeal from the United States District Court
for the District of Columbia

(No. 96cv02399)

Argued: October 19, 1998
Decided: January 22, 1999

Before: Williams, Ginsburg and Rogers, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* Williams.

JoAnn Carpenter alleges that her employer, Federal National Mortgage Association ("Fannie Mae") discriminated against her on account of her sex in promoting a male colleague rather than herself, and thus violated the District of Columbia Human Rights Act, D.C. Code Sections 1-2512 *et seq.* The District Court granted summary judgment in favor of Fannie Mae, and Carpenter appeals.

Although much of the evidence in the record on summary judgment is documentary, the parties draw from it radically different lessons. As Fannie Mae sees the case, the promotion decision was simply one of merit. As Carpenter sees it, the evidence of meritocracy is no more than a facade, erected to cover up high-level male management's true purpose -- to respond to her efforts in favor of a company policy restricting fraternization and thus more effectively preventing sex discrimination in the form of sexual harassment. The district court found that Fannie Mae had presented evidence of a legitimate non-discriminatory reason for its decision, and that a reasonable jury could not draw from plaintiff's evidence the inference that Fannie Mae's reasons were in fact pretextual. Thus it granted summary judgment. On the view we take of the case, this assessment is unnecessary. Because the evidence on which Carpenter relies makes out a case of ideological rather than sex discrimination (if anything), a jury could not properly hold Fannie Mae liable.

I.

JoAnn Carpenter has served as a vice president and deputy general counsel in Fannie Mae's legal department since 1987. In July 1996, as part of a reorganization of its legal department, Fannie Mae decided to promote one of its vice presidents to a new supervisory and management role. Senior Vice President Anastasia Kelly, who joined Fannie Mae in 1995, was to delegate some of her existing management duties to this new "super vice president." Fannie Mae selected Joseph Biegel instead of Carpenter for this role.

According to Fannie Mae, Kelly chose Biegel after she considered all of the other vice presidents in the Office

of General Counsel. Instead of using past evaluations, she relied on her own experience with the vice presidents over her year-long tenure at Fannie Mae. She says in her deposition that she looked at everyone who worked for her and chose a lawyer who had strong interpersonal and communication skills. After she had selected Biegel, she consulted the other Senior Vice President, Anthony Marra, who agreed with her decision. Together they proposed the appointment in memoranda to Executive Vice President and General Counsel Robert Zoellick, President and Chief Operating Officer Larry Small, and Chairman and Chief Executive Officer James Johnson.

Carpenter does not seriously attack the proposition that Fannie Mae put on a case of a legitimate, non-discriminatory reason for its decision. Her argument is that a jury might conclude that it was invented simply to conceal the real story. That story has three essential elements. First, she says she actively favored an anti-fraternization policy that was anathema to high-level male management. Second, because of her anti-fraternization views male management as early as 1994 preselected Biegel and eliminated her as a candidate. Third, they concocted all the criticisms of her in her evaluatiuons to cover up their discriminatory motives, and made their decision appear to be that of Kelly, who was in fact only a "pawn of the male upper management."[1]

---

[1]These past evaluations, which Kelly says she did not consult, seem to support the conclusion that as an employee Biegel was clearly as qualified as, if not superior to, Carpenter. Both Biegel and Carpenter received similar numerical grades over the past five years, and in the year before the reorganization Biegel received a higher score. Also in evidence were extensive sets of notes made in 1994 and 1995 either in preparation for meetings of Carpenter's and Biegel's bosses relating to personnel matters or as memorials of statements made at such

Carpenter claims that in the latter part of 1993 she heard that a male supervisor, known for these purposes as Mr. Doe, was having an affair with an employee he supervised. She believed that any sexual relationship between a male officer and a female subordinate (or vice versa) should be investigated because of the possibility of sexual harassment. In early 1994 she evidently suggested to Fannie Mae's Business Code of Conduct Committee (of which she was a member) the desirability of an anti-fraternization policy. To her recollection, there was no opposition to her proposal and it was later adopted.

Carpenter's contention that this proposal and her anti-fraternization views generally were anathema to high-level male management rests on an exchange with Marra in 1996 after Biegel's promotion. At the close of a discussion about Fannie Mae's reorganization, Carpenter said in a deposition, Marra asked "how are things going with [Mr. Doe]?" Carpenter contends that this reference to the Doe matter in a discussion about the reorganization of Fannie Mae suggests that the decision not to promote her was linked to her anti-fraternization views. From the inference of opposition to her views she draws the further inference

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meetings. Although the notes reflect statements (made or intended to be made) characterizing Carpenter favorably, the statements about Biegel are more favorable, e.g., "broader" (in explicit contrast with Carpenter, who is twice dubbed "narrow" and said to "need rounding"), "good presence," "a star," with feedback from the General Counsel's "clients" within Fannie Mae expressing special enthusiasm (one of them, a woman, would "take [him] on in a second"). The overall gist of these was evidently communicated to Kelly, who met with Zoellick soon after joining Fannie Mae in 1995 to discuss the vice presidents in the legal department.

that Biegel was preselected and that the formal numerical evaluation and the informal notes were pure camouflage.

And to show that Kelly was only a "pawn" of the males she points to an e-mail message from Biegel to Small in which Biegel thanked Small for his selection, and to admissions allegedly made by Kelly to Carpenter. These "admissions," said by Carpenter to support all elements of her theory, occurred in a meeting between Carpenter and Kelly on September 6, 1996, after Carpenter complained to both Kelly and Marra that Biegel's promotion manifested sex discrimination. Carpenter recounted in a deposition that when she told Kelly about her grievances, Kelly "responded, ... saying, I wish I could tell you you're crazy, but you're not. And then she added, Other people are." "She mentioned that if she were in my position, she would feel the same way, and she prefaced that with, Between us girls." Carpenter said Kelly asked her "if there was anything Fannie Mae could do to mitigate the damage," and specifically offered her stock options.

II.

Once the defendant offered credible evidence of a reason for the promotion decision that was free of sex discrimination, Carpenter could defeat the defense motion for summary judgment only by offering direct or indirect evidence of discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). In interpreting its Human Rights Act the District of Columbia also follows this formula, *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 361 (D.C. 1993), and generally seems ready to accept the federal constructions of Title VII, given the substantial

similarity between it and the D.C. Human Rights Act. *Id.* at 361, n.17. Indirect proof can take the form of evidence from which a jury could find that Fannie Mae's stated reasons for selecting Biegel were pretextual. *Hicks*, 509 U.S. at 511. Usually such undermining evidence will be enough to get a plaintiff's claim to a jury. *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998) (en banc). This is not always the case, however. "[I]n some instances, ... the fact that there are material questions as to whether the employer has given the real explanation will not suffice to support an inference of discrmination." *Id.* At 1291.

This is one such instance. Sometimes an employer may offer a meritocratic or otherwise high-sounding explanation for a decision intending to cover up an unsavory reason -- but one that is not illegal under the antidiscrimination laws. If the plaintiff explodes the phony reason with evidence that simply supports an unsavory but lawful alternative reason (or, more technically, offers evidence from which a jury might find such to be the true reason), the plaintiff cannot get to the jury. "If a plaintiff shoots himself in the foot, surely there is no point in sending the case to the jury." *Aka*, 156 F.3d at 1291. Thus in *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1338 (8th Cir. 1996), which we cited approvingly in *Aka*, the plaintiff "acknowledged" that he was fired because the employer wanted, against plaintiff's will, to cover up its collection of millions of dollars in violation of SEC regulations. "This acknowledgement standing alone would completely refute [the plaintiff's] claim of age discrimination." *Id.* at 1337. And in *Visser v. Packer Engineering Assoc., Inc.*, 924 F.2d 655, 657 (7th Cir. 1991) (en banc), also cited approvingly in Aka, the plaintiff

asserted age discrimination but offered evidence that the real reason was disloyalty to the firm's chief executive officer. "It does not show or even tend to show that [the plaintiff] was fired because of his age. It tends if anything to show the opposite." *Id.*

Assuming in Carpenter's favor that the evidence is such that a reasonable jury could reject Fannie Mae's proffered reasons for selecting Biegel, her entire theory nonetheless rests on the premise that Fannie Mae's male upper management concocted a scheme to defeat her as a candidate for promotion because of her outspoken advocacy of eliminating fraternization in the workplace. Carpenter's stance that she was not promoted because of her views is unequivocal. Summing up the evidence and her take on it she says, "Accordingly, there is no explanation for eliminating Carpenter as a candidate for promotion *except the discriminatory bias created by her active participation in seeking to protect the rights of women employees.*" App Br. at 33 (emphasis in original).

But the espousal of views for or against fraternization in the workplace is not a surrogate for being male or female. In *Rothmeier*, plaintiff attempted a parallel theory, claiming that high ethical standards were so closely associated with age that to penalize an employee for his whistleblowing was the equivalent of penalizing him for age. 85 F.3d at 1337-38. The court rejected the idea as "premised on a highly dubious correlation," *id.*, and we find Carpenter's implicit claim of correlation equally dubious.[2]

---

[2] Of course civil rights statutes may make retaliation a claim in some circumstances, such as Title VII's rule against an employer's discriminating "against any of his employees .. . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

Everyday life refutes the notion that skepticism of or even opposition to an anti-fraternization policy proposal constitutes discrimination against women. Persons who devote their careers largely to seeking effective legal restriction of sexual harassment commonly insist on a sharp distinction between workplace relationships that are welcome on both sides (even with Olympian status differentials between the participants), and unwelcome attentions. See, Kathy Rodgers, Commentary, "What Is and Isn't Sexual Harassment," *Chicago Tribune*, Feb. 6, 1998, at 31 (author, executive director of NOW Legal Defense and Education Fund, insists staunchly on need that sexual attentions be unwelcome for them to be sexual harassment, and rejects notion that status differential of any sort could substitute for unwelcomeness); Gloria Steinem, Editorial, "Women and the White House, 'No' means 'No,' and 'Yes' means 'Yes,'" *Fort Worth Star-Telegram*, March 29, 1998, at 3 ("The power imbalance between [parties] increase[s] the index of suspicion, but ... [w]elcome sexual behavior is about as relevant to sexual harassment as borrowing a car is to stealing one"). The position of Fannie Mae's management on either side of this issue is in no way a proxy for gender bias.

In her reply brief Carpenter offers a convoluted argument trying to forge such a link. Citing *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998), and *Meritor Savings Bank v. Vinson*, 477 U.S. 57,

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assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a)(1994). But Carpenter has framed her suit as one of sex discrimination, not retaliation, and in any event makes no claim that fraternization is an employment practice made unlawful by the antidiscrimination laws.

68 (1986), she argues that the voluntariness of workplace sexual relations does not end the inquiry regarding sexual harassment and that the inference of sex discrimination is easy to draw in most instances of sexual harassment. Therefore, she concludes, the anti-fraternization policy "is directly related to sexual harassment, because without such a prohibition, an employer would need to investigate every case of fraternization to determine whether sexual advances are unwelcome." But, even accepting Carpenter's Orwellian assumption that every instance of fraternization must be investigated lest it actually be sexual harassment, the argument assumes rather than establishes its equation of gender with antifraternization advocacy.

Similarly, Carpenter cites *Broderick v. Ruder*, 685 F. Supp. 1269, 177-78 (D.D.C. 1988), for the proposition that she can raise the sexual discrimination claim even though she was not the victim of sexual harassment. But that case held only a plaintiff could make out a hostile work environment claim on the basis of a pervasive atmosphere of sexual harassment of others, including a general practice of trading advancement for sexual accommodation. *Id.* at 1277-78. Carpenter, of course, claims neither hostile work environment nor the existence of any such practice at Fannie Mae.

Finally, in her reply brief Carpenter hints at another alternative -- that her "zeal [in pursuing anti-fraternization policies] did not fit male management's stereotype of a woman's role in Fannie Mae's environment of insensitivity to the sexual harassment of women." If Fannie Mae treated zeal in women differently from zeal in men, of course Carpenter would have a case. But she has neither offered evidence nor (until the Reply) even contended that this was such a case. Accordingly, we can only read this passage as

essentially a restatement of her basic claim that Fannie Mae should be held liable because it denied her promotion because of its resistance to her fraternization policy proposals. But, as we have said, that does not make out a case of gender discrimination.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7201

September Term, 1998

96cvO2399

JOANN CARPENTER,

Appellant

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellee.

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

Entered: March 5, 1999

ORDER

Upon consideration of appellant's Petition for Rehearing *En Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By: Robert A. Bonner
Deputy Clerk

Circuit Judges Wald, Silberman and Garland did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7201

September Term, 1998

96cvO2399

JOANN CARPENTER,

Appellant

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Appellee.

Before: Williams, Ginsburg and Rogers, Circuit Judges

Entered: March 5, 1999

ORDER

Upon consideration of appellant's petition for rehearing filed February 22, 1999, it is

ORDERED that the petition be denied.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By: Robert A. Bonner
Deputy Clerk

*1570 D.C. Code § 1-2512

WEST'S DISTRICT OF COLUMBIA CODE

Part 1. Government of District

Title 1. Administration
Chapter 25. Human Rights
Subchapter 11. Prohibited Acts of Discrimination

Current through Laws 12-1 to 12-104, 12-113, 12-114, 12-125 to 12-127, and Act 12-138 of the 12th District Council Session (1997-1998)

§ 1-2512. Discriminatory employment practices

(a) It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual:

(1) By an employer. To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee;

(2) By an employment agency. To fail or refuse to refer for employment, or to classify or refer for employment, any individual, or otherwise to discriminate against, any individual; or

(3) By a labor organization. To exclude or to expel from its membership, or otherwise to discriminate against, any individual; or to limit, segregate, or classify its membership; or to classify, or fail, or refuse to refer for employment any individual in any way, which would deprive such individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment; or

(4) By an employer, employment agency or labor organization. (A) To discriminate against any individual in admission to or the employment in, any program established to provide apprenticeship or other training or retraining, including an on-the-job training program; (B) To print or publish, or cause to be printed or published, any notice or advertisement, or use any publication form, relating to employment by such an employer, or to membership in, or any classification or referral for employment by such a labor organization, or to any classification or referral for employment by such an employment agency, unlawfully indicating any preference, limitation, specification, or distinction, based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, disability, or political affiliation of any individual.

*1571 (b) It shall further be an unlawful discriminatory practice to do any of the above said acts for any reason that

would not have been asserted but for, wholly or partially, a discriminatory reason based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, disability, or political affiliation of any individual.

(c)(1) It shall further be an unlawful discriminatory practice for an employer to refuse to make a reasonable accommodation for an employee's religious observance by permitting the employee to make up work time lost due to such observance, unless such an accommodation would cause the employer undue hardship. An accommodation would cause an employer undue hardship when it would cause the employer to incur more than de minimis costs.

(2) Such an accommodation may be made by permitting the employee to work:

(A) During the employee's scheduled lunch time or other work breaks;

(B) Before or after the employee's usual working hours;

(C) Outside of the employer's normal business hours;

(D) During the employee's paid vacation days;

(E) During another employee's working hours as part of a voluntary swap with such other employee; or

(F) In any other manner that is mutually agreeable to the employer and employee.

(3) When an employee's request for a particular form of accommodation would cause undue hardship to the employer, the employer shall reasonably accommodate the employee in a manner that does not cause undue hardship to the employer. Where other means of accommodation

would cause undue hardship to the employer, an employee shall have the option of taking leave without pay if granting leave without pay would not cause undue hardship to the employer.

(4) An employee shall notify the employer of the need for an accommodation at least 10 working days prior to the day or days for which the accommodation is needed, unless the need for the accommodation cannot reasonably be foreseen.

(5) In any proceeding brought under this section, the employer shall have the burden of establishing that it would be unable reasonably to accommodate an employee's religious observance without incurring an undue hardship, provided, however, that in the case of an employer that employs more than 5 but fewer than 15 full-time employees, or where accommodation of an employee's observance of a religious practice would require the employee to take more than 3 consecutive days off from work, the employee shall have the burden of establishing that the employer could reasonably accommodate the employee's religious observance without incurring an undue hardship; and provided further, that it shall be considered an undue hardship if an employer would be required to pay any additional compensation to an employee by reason of an accommodation for an employee's religious observance. The mere assumption that other employees with the same religious beliefs might also request accommodation shall not be considered evidence of undue hardship. An employer that employs 5 or fewer full-time employees shall be exempt from the provisions of this subsection. ***1572**

Amended by D.C Law 10-129, § 2(c) (41 DCR 2583), eff June 28, 1994.

No._____

Supreme Court, U.S.
FILED

982020 JUN 3 -

In The Supreme Court Of The United States

OFFICE OF THE CLERK

OCTOBER TERM, 1998

JOANN CARPENTER,

Petitioner,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR *WRIT* OF *CERTIORARI*

Nicholas H. Hantzes
12110 Sunset Hills Road
Suite 450
Reston, Virginia 20190
(703) 378-5000

Dennis M. Hart
1301 Pennsylvania Ave., N.W.
Suite 500
Washington, D.C. 20004
(202) 546-7770

Counsel for the Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg Richmond, Virginia 23219 (804) 648-3664

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98-563

JOANN CARPENTER,

Plaintiff,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant.

MEMORANDUM OPINION AND ORDER

This action comes before the Court on Defendant Federal National Mortgage Association's Motion for Summary Judgment. The Court has carefully considered Defendant's Motion for Summary Judgment, Plaintiff's Opposition to this Motions and Defendant's Reply thereto. For the reasons set forth herein, Defendant's Motion for Summary Judgment is granted.

I. Background

Plaintiff Joann Carpenter has served as a Vice President in the Office of General Counsel at the Federal National Mortgage Association ("Fannie Mae") from 1987 to the present. She brought an action for gender discrimination and retaliation against Fannie Mae on October 17, 1996. In that action, after the close of discovery, Fannie Mae filed a motion for summary judgment which this Court granted in an October 28, 1997 memorandum opinion and order.

Plaintiff filed another action on March 5, 1998 for retaliation. That action is the subject of this opinion. Here, Carpenter claims that Fannie Mae retaliated against her for bringing the prior lawsuit by not selecting her for a Senior Vice President position and by downgrading her performance rating by one-half step in 1997. According to Carpenter, soon after she filed the 1996 lawsuit, Anastasia Kelly, one of Carpenter's supervisors, told her that she "should not cut off her nose to spite her face." Anthony Marra, another one of her supervisors allegedly said that she should drop her claim. According to Carpenter, due to the contentiousness of the earlier litigation, her working relationship with her supervisors became strained.

Carpenter applied for a Senior Vice President position in 1997. The Position Description for this position called for, among other things, a candidate with litigation experience. Carpenter does not have experience in litigation. Carpenter states that she is qualified for this position. She submitted a written summary of her qualifications when she applied. Fannie Mae interviewed Carpenter for the position, but did not select her for further consideration. At the time Fannie Mae filed this motion, it had not yet selected the person to fill this position. It had, however, narrowed down the pool to three external candidates, all of whom possessed extensive litigation experience.

Also, Carpenter contends that she should have received a higher rating than she did for her 1997 performance. Fannie Mae evaluates its employees annually. It gives each person a numerical rating on a scale of 1 to 5. This rating corresponds with a written description: 5 indicates that the person significantly exceeded her objectives, 4 indicates that the person frequently exceeded her objectives, etc. Compensation decisions are based directly on the numerical performance rating. Part of what determines an employee's rating is how that person compares to others in the same position.

In both 1995 and 1996 Carpenter received a 5- In 1997 she received a 4+ Carpenter states that she should have received a 5- because her performance has not changed since 1996 Fannie Mae reorganized its legal department in July 1996 As a result, more people served as Vice President than in previous years The only Vice Presidents who received a better rating than Carpenter in 1997 were persons to whom Carpenter had never been compared and Joseph Biegel who received a higher rating than Carpenter in 1996

II. Discussion

Carpenter claims that Fannie Mae retaliated against her in violation of the District of Colombia Human Rights Act ("DCHRA") D C Code § 1-2501 et seq [1] Specifically, Carpenter claims that Fannie Mae failed to promote her to Senior Vice President and downgraded her performance by one-half step because she brought a discrimination claim in 1996

Fannie Mae filed a motion for summary judgment prior to discovery Rule 56(f) of the Federal Rules of Civil Procedure determines whether the Court should grant a

[1] In interpreting the DCHRA, the District of Columbia looks to federal statutes and case law See Blackman v Visiting Nurses Assoc , 694 A 2d 865, 868 (D C 1997)

summary judgment motion prior to discovery. Fed R Civ P. 56(f). It gives the Court discretion to allow discovery prior to granting summary Judgment where "it appear[s] from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party opposition..." Id. The Court "...should continue a summary judgment motion upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to preclude summary judgment." State of California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). The nonmoving party has the burden of showing what facts she hopes to discover that would create a triable issue of fact and what reason justifies her inability to produce them on the motion. Hotel & Restaurant Employees Union, Local 25, et al. v. Attorney General of the United States, 804 F.2d 1256, 1259 (D.C. Cir. 1986). The party seeking a continuance must explain why she cannot present facts to oppose summary judgment and how additional discovery will promote the facts. Medina v. Runyon, Civ. A. No. 95-1446, 1996 WL 346960 at *1 (D.D.C. 1996). Here, the crux of this motion hinges on whether Carpenter can show that through discovery she can elicit facts that will demonstrate pretext.

A plaintiff can prove a retaliation claim through either direct or indirect evidence. Kale Kiristos v. CTS Hotel Management Corp., 95 F.Supp. 641, 665 (D.D.C. 1997); see O'Donnell v. Associated Gen. Contractors of Am., Inc., 645 A.2d 1084, 1086 (D.C. 1984) (Courts use the burden of proof for a claim of disparate treatment based on federal law in applying the District of Columbia Human Rights Act). Here, Carpenter contends that both direct and indirect evidence require the Court to deny Fannie Mae's Motion for Summary Judgment.

1 Direct evidence of retaliation

Carpenter asserts that direct evidence of retaliation precludes the Court from granting Defendant's Motion. A plaintiff may rely on direct evidence to prove retaliation. Kale Kiristos, 95 F.Supp. at 665. But direct evidence does not include stray remarks made in the workplace, particularly those made by a non-decision maker or those made by a decision-maker, but unrelated to the decisional process. Id. (citing Ayala-Gerena v. Bristol Myers Squibb Co., 95 F.3d 86, 96 (1st Cir. 1996). Rather, there must be a nexus between the stray remarks and the adverse employment decision. Id.

As direct evidence of retaliation, Carpenter points to statements Kelly and Marra allegedly made that she argues

threaten retaliation. According to Carpenter, Kelly told her that she "should not cut off her nose to spite her face." Marra stated that she should drop her claim. Carpenter states that they made these comments in attempt to make her drop her 1996 lawsuit. According to Carpenter, then, these remarks relate to her 1996 suit rather than the present one. Therefore, Carpenter is essentially conceding that there is no nexus between these remarks and the instant litigation. Thus, she has not proffered any evidence or even suggested that evidence might exist that will show how these remarks relate to the instant claim of retaliation. For this reason, direct evidence of retaliation will not defeat Fannie Mae's Motion for Summary Judgment.

2. Indirect evidence of retaliation

If a plaintiff cannot defeat a motion for summary judgment through direct evidence, she may use the three part burden-shifting test laid out in McDonnell Douglas v. Green, 411 U.S. 792 (1973). See O'Donnell, 645 A.2d at 1086 (D.C. 1994) (Courts use the burden of proof for a claim of disparate treatment based on federal law in applying the DCHRA). First, the plaintiff must establish a prima facie case of retaliation. McDonnell Douglas, 411 U.S. at 1824. Next, the defendant must articulate a legitimate nondiscriminatory reason for its decision or

action. Id. Finally, the plaintiff must establish by a preponderance of the evidence that the defendant's articulated reason is pretextual. Id.; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 514 (1993).

a. The Senior Vice President position

Carpenter claims that Fannie Mae retaliated against her by not selecting her to be Senior Vice President. Regardless of whether Carpenter can establish a prima facie case, Fannie Mae has articulated a legitimate nondiscriminatory reason for its action; Carpenter did not possess the qualifications Fannie Mae sought for the Senior Vice President. The Position Description sought a person with "substantial litigation or litigation management experience." As a Vice President in the Legal Department, it is undisputed that Carpenter lacks litigation experience. At the time Fannie Mae filed this motion, it had not yet selected the Senior Vice President, but had narrowed down the pool to three external candidates. Each of these candidates had extensive litigation experience. Furthermore, Fannie Mae selected no internal Vice President to be in the pool of candidates chosen for further consideration, including Vice Presidents who received a higher performance rating than Carpenter. Yet, Carpenter alleges that Fannie Mae's litigation experience requirement is a pretext for retaliation because Fannie Mae lawyers do

not engage directly in litigation and because she is qualified to be Senior Vice President.[2]

"'Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.'" Campbell, 138 F.3d at 779-80. Through discovery, Carpenter suggests that she can find out the "real reasons" for not selecting Carpenter and the reason Fannie Mae's legal department needs an attorney with litigation experience. But, here it is undisputed that each member of the narrowed pool of candidates for Senior Vice President possessed significant litigation experience. It is further undisputed that Fannie Mae selected none of its Vice Presidents for further consideration. That Fannie Mae did not really seek litigation experience is purely Carpenter's guess. Undisputed facts suggest otherwise. Carpenter's request for discovery fails to state with specificity which new facts she believes can be obtained by discovery or the

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[2] Though Carpenter seeks discovery to show that the litigation experience requirement is a pretext, she does not suggest that she requires further discovery to show that she is qualified. She has presented evidence of her qualifications in her opposition. Nonetheless, that she may be qualified to be Senior Vice President will not defeat her summary judgment motion. The Court will not intrude on an employer's "unfettered discretion to choose among qualified candidates." Fishbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996).

facts she specifically needs to support her theory. "Something more than a fanciful allegation is required to justify denying a motion for summary judgment, ..., A bare assertion that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." Contemporary Mission v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981).

Additionally, the resumes of the candidates selected for further consideration reveal that they are all accomplished attorneys who meet the other criteria Fannie Mae requested in its Position Description. Thus, the Court can assume Fannie Mae considered these candidates qualified. Carpenter's resume and work history suggest that she also meets these criteria, and is, therefore, qualified in these other respects. But, short of an error too obvious to be unintentional, the Court will respect Fannie Mae's "unfettered discretion to choose among qualified candidates." Fishbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180, 1182 (D.C. Cir. 1996). Therefore, the Court will grant summary judgment with respect to Carpenter's claim that Fannie Mae retaliated against her when it denied her the Senior Vice President position.

b. Carpenter's downgrade

Carpenter alleges that Fannie Mae retaliated against her when it gave her a 4+ rating for 1997 rather than a 5- or higher. She reasons that because she previously received a 5- and her performance has not changed, she must have earned a 5- for 1997. Fannie Mae explains, however, that the group of Vice Presidents expanded and became more competitive in 1997 as a result of a July 1996 reorganization. The ratings Vice Presidents receive are determined by comparing performance among Vice Presidents. The 1997 ratings compared Carpenter to Vice Presidents to whom she had never been compared. Of those Vice Presidents that received higher ratings than Carpenter, only one had been compared to Carpenter previously and that person had previously received a higher rating than Carpenter. Fannie Mae cites negative evaluations Carpenter received from Senior Vice Presidents in various departments and contrasts those with uniformly positive comments other Vice Presidents received in explaining Carpenter's rating. This explanation is a legitimate, non-discriminatory reason for Carpenter's downgrade.

Carpenter attempts to show pretext by introducing evidence of positive evaluations she received from the staff

of the Senior Vice Presidents who criticized her. She argues that these positive comments contradict with the negative evaluations she received and show that the Senior Vice Presidents acted with a retaliatory motive by giving negative evaluations. Carpenter suggests that through further discovery she can show that the Senior Vice Presidents who criticized her performance fabricated these criticisms to conceal a retaliatory motive. She also asserts that she can show pretext through further discovery by showing that the Vice Presidents who received better ratings than she did performed at the same level or worse than she did.

If Carpenter were able to show that Fannie Mae encouraged Senior Vice Presidents to fabricate criticisms, this would be evidence of a retaliatory motive. A plaintiff, however, cannot defeat a motion for summary judgment "by merely restating the conclusory allegations contained in his complaint and amplifying them only with speculation about what discovery might uncover." Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d. Cir. 1981); see also Novecon, Ltd. v. Bulgarian-American Enterprise Fund, et al., 977 F.Supp. 52, 55 (D.D.C. 1997) ("'if the court determines that, ... discovery would be wholly speculative, relief under Rule 56(f) must

be denied'") quoting Greenberg v. FDA (citation omitted). Here, Carpenter is merely speculating that Senior Vice Presidents fabricated criticisms of her. Nothing suggests that she can obtain evidence to support this. The fact that she received commendations from the staff of the Senior Vice Presidents does not support her allegation of fabrication. There is nothing inconsistent about Carpenter receiving positive feedback from the staff of Senior Vice Presidents and receiving specific criticisms from the Senior Vice Presidents themselves. In keeping with case law, this Court will not permit Carpenter to engage in an open-ended exploration in the hopes of discovering evidence that might support her claim. Carpenter's suggestion that discovery might reveal evidence that the Senior Vice Presidents fabricated criticisms of her will not defeat Fannie Mae's summary judgment motion.

Carpenter suggests that discovery might show that other Vice Presidents performed no better or perhaps worse than she did. Even if discovery might reveal that she actually performed better, this will not satisfy Carpenter's burden. Rather, absent a showing that Fannie Mae made an error too obvious to be unintentional, to show pretext, Carpenter must show that Fannie Mae actually believed that she performed better that other vice presidents. See

Fishbach, 86 F.3d at 1182 (in showing pretext, the issue is not the correctness or desirability of the reasons it offer, but whether the employer honestly believes the reasons it offers). Though Carpenter states that Fannie Mae believed she performed better, like her other claims, this statement is purely speculation and will not satisfy her burden under Rule 56(f).

III. Conclusion

Upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's Motion in Opposition and Defendant's Reply thereto, it is by the Court this 3rd day of August 1998,

ORDERED, that Defendant's Motion for Summary Judgment be and hereby is **GRANTED**; and it is

FURTHER ORDERED, that this case be and hereby is **DISMISSED WITH PREJUDICE**

/s/ Aubrey E. Robinson, Jr.
United States District Judge